80-1282

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT ANTHONY PODESTA,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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January 29, 1981

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QUESTION PRESENTED

Whether, in an SEC disciplinary proceeding involving a serious sanction, a violation of the anti-fraud provisions may legitimately be inferred from evidence consisting of investigatory transcripts of the *ex parte* testimony of a settling co-respondent which is ambiguous, self-contradictory and uncorroborated hearsay, when the Petitioner was unable to confront and cross-examine the witness concerning these ambiguities and contradictions at the time of the disciplinary hearing.

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SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner, Robert Anthony Podesta, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia, which are "not to be published," are reproduced in Appendix A. The opinion and order of the Securities and Exchange Commission are reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on December 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the General Rules and Regulations under the Securities Exchange Act of 1934, 17 C.F.R. § 240. 10b-5, provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

STATEMENT

Petitioner is an independent floor broker who is a member of the Chicago Board Options Exchange, Inc. ("CBOE"). His primary function is to execute orders received from CBOE members for the purchase or sale of the IBM class of call options.

The SEC purportedly found by clear and convincing evidence that on August 18 and 19, 1975 the Petitioner knowingly executed four spread transactions in IBM call options on the floor of the CBOE for two members which were contrived and not bona fide, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.[1] In addition to the finding that the Petitioner had perpetrated a fraud, the SEC imposed a 30-day suspension as an additional sanction. The finding and sanction were affirmed by the Court of Appeals in a per curiam opinion on the authority of *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 (1966).

There is *no* direct evidence in the record to support the SEC's finding that the Petitioner knowingly executed contrived transactions. The SEC's finding of fraud is based solely upon inferences from circumstantial evidence. With the exception of the basic documents prepared in connection with the execution of the four transactions, the only evidence in the record concerning the circumstances surrounding the receipt and execution of these orders by the Petitioner is excerpts from the investigatory transcripts of the testimony of Ronald R. Michno, a settling co-respondent. Mr. Michno, a CBOE member, had given the Petitioner one side of these orders to execute as an independent floor broker.

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[1] The question whether, in SEC disciplinary proceedings, violations of the anti-fraud provisions of the securities laws must be proved by clear and convincing evidence, rather than the preponderance of the evidence, is presently before the Court in *Steadman* v. *Securities and Exchange Commission,* 603 F.2d 1126 (5th Cir. 1979), *cert. granted,* Dkt. 79-1266. Although the SEC purportedly applied the clear and convincing standard in this case, the evidence in the record is clearly of insufficient quality and weight to support a finding of fraud under either standard.

The investigatory testimony relied upon by the SEC in making its finding of fraud was taken pursuant to its Rules Relating to Investigations. 17 C.F.R. § 203.1 *et seq.* Under these rules, only the witness' attorney is permitted to be present during the hearing, no objections to the form of the questions propounded by the Division of Enforcement staff attorney are permitted and the staff attorney interrogating the witness also acts as the hearing officer with regard to the resolution of any objections to the scope of the questioning or the conduct of the hearing. 17 C.F.R. § 203.7. These investigatory proceedings are more akin to the in-custody interrogation of a suspect in a criminal investigation than to a civil deposition.[2]

At the time of the actual disciplinary hearing before the SEC Administrative Law Judge, Mr. Michno testified that, although he generally recalled the mechanics of the transactions, he had no independent recollection of the circumstances surrounding the initiation of the orders which he transmitted to the Petitioner for execution or his prior testimony before representatives of the CBOE's Department of Investigations on November 11, 1976 and SEC's Division of Enforcement on November 23, 1976 and March 4, 1977. He also testified that he had reviewed these investigatory transcripts prior to the hearing and they did not refresh his recollection concerning the initiation of the four transactions. The excerpts of Mr. Michno's investigatory testimony were admitted into evidence pursuant

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[2] In *Hannah* v. *Larche,* 363 U.S. 420 (1960), this Court noted the distinction between the SEC's investigative proceedings, in which the suspect is not afforded an opportunity to confront and cross-examine witnesses, and adjudicative proceedings. In the present case, the Court is confronted with the anomolous situation in which evidence obtained in an investigative hearing was relied upon by the Commission in making its finding of fraud in an adjudicative proceeding. Due to the lack of procedural safeguards, the trustworthiness, weight and probative value of such testimony is substantially diminished.

to Rule 14 of the Commission's Rules of Practice, which permits the admission of "all relevant and material evidence." 17 C.F.R. § 201.14.[3]

These excerpts of investigatory testimony relied upon by the SEC to support its finding of fraud are self-contradictory, ambiguous and uncorroborated.[4] Since Mr. Michno was unable to recall the circumstances surrounding the initiation and execution of these transactions at the time of the disciplinary hearing, the Petitioner's attorney was unable to cross-examine him concerning these contradictions and ambiguities in an attempt to ascertain which version of his prior testimony, if any, was truthful. Concomitantly, since this testimony was given outside the presence of the SEC Administrative Law Judge, he was unable to observe the demeanor of the witness at the time it was given and assess his credibility. In making such an assessment, the demeanor of the witness while he is undergoing cross-examination concerning prior inconsistent statements is extremely significant.

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[3] On appeal, the Petitioner did not contend that these excerpts of investigatory testimony were inadmissable under the SEC's procedural rules. Petitioner's appeal was based upon the SEC's necessary reliance upon these excerpts of investigatory testimony in making its finding of fraud. So too, the issue here is not admissibility but whether a violation may be predicated solely upon such evidence.

[4] These contradictions related to such matters as how the transactions were initiated, the content of communications between Mr. Michno and the Petitioner and his prior business relationship with the Petitioner. It is clear from these excerpts of testimony that Mr. Michno did not disclose the motivation or purpose of his trading strategy to the Petitioner.

IN SUMMARILY AFFIRMING THE SEC's DETERMINATION OF THE QUESTION PRESENTED, THE COURT OF APPEALS ABDICATED ITS RESPONSIBILITY FOR ASSURING THAT ADMINISTRATIVE AGENCIES COMPLY WITH THE SUBSTANTIAL EVIDENCE TEST

Congress has entrusted the Courts of Appeals with the responsibility of determining that agency findings are supported by substantial evidence on the record as a whole. 5 U.S.C. § 706 This Court has defined substantial evidence as "more than a mere scintilla." *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 229 (1938). Such evidence "must do more than create a suspicion of the existence of the fact to be established." *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939). To meet the substantial evidence test the evidence must be of sufficient quality to "justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Id.*

In applying the substantial evidence standard, Courts of Appeal are required to set aside the administrative agency's findings "when the record before a Court of Appeals clearly precludes the Board's [Agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses ..." *Universal Camera Corp.* y. *National Labor Relations Board,* 340 U.S. 474, 490 (1951). In the present case, the Court of Appeals affirmed the SEC's finding that the Petitioner perpetrated a fraud upon the basis of inferences from the *ex parte,* self-contradictory and ambiguous transcripts of investigatory testimony of a settling co-respondent which was given outside the presence of the Administrative Law Judge. By reason of a lapse in the memory of the co-respondent at the time of the disciplinary hearing, the Petitioner was unable to

avail himself of the fundamental right of confrontation and cross-examination concerning the inconsistencies and ambiguities in this crucial testimony. *Jenkins* v. *McKeithen,* 395 U.S. 411 (1969)

It is submitted that a fair estimate of the worth of such testimony dictates a conclusion that the SEC failed to meet its burden of proof in this case, the finding of fraud is not supported by substantial evidence and the Court of Appeals affirmance of this finding constitutes an abdication of its responsibility for assuring that the SEC keeps within reasonable grounds when it publicly impugns an individual's character and reputation by finding him guilty of quasi-criminal wrongdoing. *Addington* v. *Texas,* 411 U.S. 418, 424 (1979); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 29, 1981

APPENDIX A

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2335 September Term, 1980

ROBERT A. PODESTA, *Petitioner*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

Before: McGOWAN and EDWARDS, Circuit Judges and JOYCE HENS GREEN,* United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Securities and Exchange Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the order of the Securities and Exchange Commission under review is affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

George A. Fisher
Clerk

* Sitting by designation pursuant to 28 U. S. C. § 292(a).

MEMORANDUM

Petitioner, a registered broker-dealer and a member of the Chicago Board Options Exchange, Inc., was charged by the Securities and Exchange Commission with wilful violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. 78j(b), and of Rule 10b-5 issued thereunder. In an administrative proceeding, the Commission independently reviewed the record made before an Administrative Law Judge and affirmed his findings that petitioner, functioning as a floor broker on the Chicago Exchange, had reported options transactions effectuated by him for principals having no *bona fide* economic purposes; and, by reason of such reporting, had knowingly caused the dissemination of materially misleading information to the public with respect to the state of the market for such options. The penalty imposed was a 30-day suspension. The matter is before this court upon direct review of the Commission's action.

There is no issue before us as to the legal standards by which petitioner's conduct is to be measured. The Commission has, for the purposes of this case, asserted that the burden of proving both scienter and the existence of a violation by clear and convincing evidence has been carried by it, and invites our review of the result reached by it by reference to those standards. The question before us as to guilt is, thus, solely that of whether there is substantial evidence in the record to support the Commission's finding of a knowing violation. Mindful of the limited nature of our review in this regard and that we are not to substitute our judgment for that of the Commission in appraising the evidence, *Consolo* v. *Federal Maritime Commission,* 383 U. S. 607 (1966), we find that the record contains substantial support for the result reached by the Commission.

APPENDIX B

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 16209/September 18, 1979

Admin. Proc. File No. 3-5350

In the Matter of

ROBERT A. PODESTA
208 South LaSalle Street
Chicago, Illinois
(8-18739)

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDINGS

Grounds for Remedial Action

Fraudulent Dissemination of Materially Misleading Market Information

Where registered broker-dealer, who was exchange floor broker, knew that he was executing contrived transactions in option contracts, and was aware or recklessly indifferent to the fact that he was thereby causing the public dissemination of materially distorted market information, *held,* in public interest to suspend broker-dealer's registration for one month and suspend him from association with any broker or dealer for the same period.

APPEARANCES:

Jack M. Whitney, II and *D. Daniel Barr,* of Bell, Boyd, Lloyd, Haddad & Burns, for respondent.

Peter B. Shaeffer, of the Commission's Chicago Regional Office, for the Division of Enforcement.

I.

Robert A. Podesta, a registered broker-dealer and a member of the Chicago Board Options Exchange, Inc. ("CBOE"), appeals from the adverse decision of an administrative law judge. The law judge found that Podesta violated antifraud provisions by executing contrived transactions in IBM options on the CBOE, thereby causing distorted market information to be publicly disseminated. He suspended Podesta's registration for one month, and suspended Podesta from association with any broker or dealer for the same period. On the basis of an independent review of the record, we make the following findings.

II.

During the period at issue, Podesta was an experienced CBOE floor broker who specialized in IBM options.[1] Frank S. Groseclose was a CBOE member, registered with the firm of Marcus, Schloss & Co., Inc. ("Marcus"), and Ronald R. Michno was a CBOE market maker.[2] On August 4, 1975, Michno engaged in an option transaction with Marcus which resulted in Michno losing several thousand dollars. Shortly thereafter, Groseclose, on behalf of Marcus, informed Michno that he would be reimbursed for his loss.

On August 18, 1975, at about 2:10 p.m., Podesta suggested to Michno that he sell a spread to Marcus for 400 IBM

---

[1] A floor broker accepts and executes orders for the accounts of other exchange members.

[2] Marcus, Groseclose and Michno were also named as respondents in these proceedings. We accepted offers of settlement from all three prior to the hearings herein. See *Marcus, Schloss & Co., Inc.*, Securities Exchange Act Release No. 14332 (January 3, 1978), 13 SEC Docket 1295; *Ronald R. Michno,* Securities Exchange Act Release No. 14331 (January 3, 1978), 13 SEC Docket 1295; *Frank S. Groseclose,* Securities Exchange Act Release No. 14479 (February 16, 1978), 14 SEC Docket 188.

contracts.[3] Prior to that time, Michno had never purchased or sold a spread involving more than 100 contracts. He wondered why Podesta would approach him "on a big trade like this." Podesta predicted that the trade would be "beneficial" to Michno and told him that "Marcus Schloss wants you to . . . do this." Michno agreed to the trade on the basis of his faith in Podesta's judgment and his belief that Marcus was using this method to reimburse him for his prior loss. Podesta then executed the trade, as follows:

Michno	Price	Marcus
Buy 400 IBM Oct 180[4]	10-7/8	Sell 400 IBM Oct 180
Sell 400 IBM Jan 180	17-3/4	Buy 400 IBM Jan 180

Shortly thereafter, Podesta summoned Michno and told him that Marcus wanted to know if he wished to reverse the trade he had just made. Podesta gave Michno the prices at which Marcus was willing to deal and advised Michno to accept Marcus's offer. Michno continued to assume that he was being repaid for his prior loss, and agreed to the trade. Accordingly, at about 2:55 p.m., Podesta executed the following transaction:[5]

Michno	Price	Marcus
Sell 400 IBM Oct 180	10-3/4	Buy 400 IBM Oct 180
Buy 400 IBM Jan 180	17-3/8	Sell 400 IBM Jan 180

---

[3] A spread transaction is the combined purchase of one option contract and the sale of another in the same underlying stock. The price of acquiring or selling a spread is the difference between the prices of the two options involved.

[4] The standard option contract gives the buyer the right to buy 100 shares of the underlying security at a certain price known as the "striking price." Thus, the first entry shows a purchase by Michno of the right to buy 40,000 shares of IBM until October 1975 at a price of $180 per share.

[5] Before executing the reversal of the 400 contract spread, Podesta executed three transactions for Marcus involving 15 IBM spread contracts. These transactions permitted the complete reversal of the 400 contract spread without the necessity of filling intervening orders.

As a result of these transactions, Michno realized a profit of $10,000.[6] The two crossed spreads represented 81% of the Jan 180 IBM contracts and 57% of the Oct 180 contracts that were traded that day on the CBOE.

The next morning, August 19, 1975, Podesta summoned Michno and told him that Marcus wanted to purchase another spread in IBM call options, this time for 200 contracts, that might be "beneficial" to him. Michno again assumed that Marcus was seeking to repay Michno's August 4th loss and agreed to the trade. At about 9:25 a.m. Podesta crossed the following spread:

Michno	Price	Marcus
Buy 200 IBM Oct 180	10-3/8	Sell 200 IBM Oct 180
Sell 200 IBM Jan 180	17-1/4	Buy 200 IBM Jan 180

Shortly thereafter, Podesta asked Michno if he wanted to reverse the spread, stating that Michno could get out at a profit. Michno agreed, and, at 10:07 a.m., Podesta executed the reversal as follows:

Michno	Price	Marcus
Sell 200 IBM Oct 180	9-3/4	Buy 200 IBM Oct 180
Buy 200 IBM Jan 180	16-1/4	Sell 200 IBM Jan 180

Michno realized a profit of $7,500 on the reversal.[7] The crossed spreads executed by Podesta represented 88% of the Jan 180 IBM contracts and 38% of the Oct 180 IBM contracts that were traded on the CBOE on August 19. Following these transactions, Michno considered that Marcus had completely repaid him for his August 4th loss.

All of the transactions in question were publicly disseminated on the Market Data Retrieval tape. For his services in executing those transactions, Podesta received commissions of $4,300.

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[6] Marcus bought the spread for 6⅞, or $275,000. Michno repurchased it for only 6⅝, or $265,000, when the transaction was reversed.

[7] Marcus bought the spread for 6⅞, or $137,500. Michno repurchased it for 6½, or $130,000, when the transaction was reversed.

III.

As the law judge found, and as is readily apparent from the foregoing, Podesta "orchestrated" the transactions at issue by steering Michno into a series of trades whose sole purpose was to transfer money from Marcus to Michno. We find the inference compelling that Podesta was fully aware that those trades, in which he played such an important role, were contrived and not bona fide. He was also fully aware that the transactions would be publicly reported, and that public investors would rely on them as a fair representation of the market.

The amount of activity in a particular security is of great importance to investors, particularly in determining that security's liquidity. The transactions executed by Podesta represented substantial percentages of the total daily trading volume in the options at issue on August 18 and 19. Thus, because of the contrived nature of those transactions, investors were materially misled as to the options' liquidity.

Podesta bears a large measure of responsibility for the distorted picture of the market that investors were given. We accordingly conclude that he willfully violated the antifraud provisions of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.[8]

---

[8] We find the evidence with respect to Podesta's violations clear and convincing. Podesta argues that such is not the case, asserting that we should not rely on excerpts from Michno's prior investigative testimony. But that testimony, which was offered into evidence after Michno's recollection had been exhausted, was admitted with Podesta's full approval. In fact, staff counsel and counsel for Podesta agreed on the excerpts that were appropriate for admission into evidence. Evidence so admitted can properly be considered and accorded its natural probative effect. See *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 155 (1941). See also 5 Wigmore, Evidence ¶ 1408 (Chadbourn rev. 1974); McCormick, Evidence p. 494 (1954).

IV.

Podesta argues that, contrary to the allegations in the order for proceedings, the record is devoid of any evidence of an agreement between himself, Michno, Marcus and Groseclose; that Michno felt he was assuming a market risk by reason of his sales to Marcus, and in fact did assume such a risk; and that all of the spread transactions were subject to the competitive forces of the marketplace, since Podesta crossed them openly on the CBOE floor through "open outcry" giving other members a chance to participate in the trades.

These contentions are wholly lacking in merit. The charges with respect to Podesta do not allege any agreement among those involved in the trades at issue, nor is proof of any such agreement necessary to our findings. As for the risk involved, whatever Michno may have feared at the time, he did not realistically assume any risk in the brief intervals between his trades and their reversal. Finally, no other member had any chance to participate in the crossed spreads. As Podesta himself testified:

> "[T]he [CBOE] rule speaks about making ... all the trading crowd aware of your bid and offer. To a trader making aware encompasses making sure that you made your outcry of your bid and offer in a loud enough fashion so everybody heard, allowing them to react is a far different thing. Trading takes place in a matter of really mille-seconds (sic).... You don't owe anyone a chance to digest your offer ... you owe them a chance to hear it.... [W]hen I [recite a cross] loud enough so everyone can hear ... I can proceed to cross.... It's a dog-eat-dog situation...."

Podesta further argues that the transactions at issue did not result in material misrepresentations being made to the public; that he did not have the requisite intent to deceive required by the Supreme Court's decision in *Ernst & Ernst* v. *Hochfelder;*[9]

[9] 425 U.S. 185 (1976).

and, finally, that the charges against him fall exclusively within the purview of Section 9(a)(1) of the Exchange Act,[10] and cannot be brought under Section 10(b) of the Act and Rule 10b-5.

We cannot accept these arguments. The record clearly shows that the public's perception of the market for the options in question was materially distorted. There was uncontroverted expert testimony that liquidity is best determined by volume, including the volume of hedging transactions such as spreads. Any reasonable investor would have considered the contrived nature of Podesta's trades a material factor in evaluating the market information disseminated with respect to the IBM options on the days in question.[11]

Assuming that *Hochfelder* applies to proceedings of this sort, a position with which we disagree, we think it clear that Podesta had the requisite scienter. Podesta knew that he was executing transactions that were not bona fide, and he was either aware of or recklessly indifferent to the consequences of his actions on the public's perception of the market for the IBM options at issue.[12]

Finally, the anti-manipulative provisions of Section 9(a) do not operate as a limitation on Section 10(b). The legislative and judicial history of the latter section make it clear that Section 10(b) and the rules thereunder are to operate independently of other securities laws provisions.[13]

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[10] Section 9(a)(1) proscribes certain transactions in securities registered on a national exchange which are effected "for the purpose of creating a false or misleading appearance of active trading . . . or a false or misleading appearance with respect to the market for any such security."

[11] See *TSC Industries, Inc.* v. *Northway,* 426 U. S. 438, 449 (1976).

[12] See *Arthur Lipper Corp.,* v. *S. E. C.,* 547 F. 2d 171, 180-81 (C. A. 2, 1976); *Edward J. Mawod & Company* v. *S. E. C.,* 591 F. 2d 588, 596 (C. A. 10, 1979); *Wright* v. *Heizer Corporation,* 560 F. 2d 236, 251-252 (C. A. 7, 1977); *First Virginia Bankshares* v. *Benson,* 559 F. 2d 1307, 1314 (C. A. 5, 1977).

[13] See *United States* v. *Charnay,* 537 F. 2d 341, 350-351 (C. A. 9, 1976).

Section 10(b) and Rule 10b-5 proscribe any course of conduct which operates as a fraud or deceit as to the nature of the market for a security.[14] As one court has stated:

> "[W]e must again underscore at the risk of repetition, that the investing public is hurt by exposure to false or deceptive statements irrespective of the purpose underlying their issuance.... Accordingly, we hold that Rule 10b-5 is violated whenever assertions are made ... in a manner reasonably calculated to influence the investing public, e.g., by means of the financial media ... if such assertions are false or misleading or are so incomplete as to mislead irrespective of [the motivation behind them.]" (footnote omitted).[15]

V.

Podesta's activities resulted in a material deception being practiced on the investing public. However, when questioned about the transactions at issue, Podesta replied, "I am a floor broker, period. I am not paid to have suspicians [sic]."

We agree with the law judge that it is necessary to impress upon Podesta the need for reasonable care in the conduct of his securities activities. We accordingly conclude that the relatively lenient sanctions which the law judge imposed are fully warranted in the public interest.

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[14] *Michael Batterman,* Securities Exchange Act Release No. 12278 (March 29, 1976), 9 SEC Docket 307, 308.

[15] *S. E. C.* v. *Texas Gulf Sulphur Co.,* 401 F. 2d 833, 861-2 (C. A. 2, 1968, *cert. denied,* 394 U. S. 976 (1969). *See also Heit* v. *Weitzen,* 402 F. 2d 909, 913 (C. A. 2, 1968), *cert. denied,* 395 U. S. 903, and *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F. 2d 787, 792-797 (1969), *cert. denied,* 400 U. S. 822, where the court stated at 793:

> "Standard had 'painted the tape' in Air Brake stock. ... [Its actions] inevitably distorted the market picture and deceived public investors. ... [C]oncealing from the public ... the true situation as to the market it was making in Air Brake stock resulted in violations of Section 9(a)(2) and 10(b) of the Act."

An appropriate order will issue.

By the Commission (Commissioners LOOMIS, EVANS, POLLACK AND KARMEL); Chairman WILLIAMS not participating.

GEORGE A. FITZSIMMONS
Secretary

Shirley E. Hollis

By: SHIRLEY E. HOLLIS
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 16209 / September 18, 1979

Admin. Proc. File No. 3-5350

In the Matter of

ROBERT A. PODESTA
208 South LaSalle Street
Chicago, Illinois
(8-18739)

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the registration as a broker and dealer of Robert A. Podesta be, and it hereby is, suspended for a period of one month; and it is further

ORDERED that Robert A. Podesta be, and he hereby is, suspended from being associated with any broker or dealer for a period of one month; and it is further

ORDERED that the suspensions shall be effective at the opening of business on October 8, 1979.

By the Commission.

GEORGE A. FITZSIMMONS
Secretary

Shirley E. Hollis

By: SHIRLEY E. HOLLIS
Assistant Secretary

No. 80-1282

MAR 24
ALEXANDER L.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT ANTHONY PODESTA, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1282

ROBERT ANTHONY PODESTA, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner claims that the court of appeals erred in holding that there was substantial evidence in the record to support the Securities and Exchange Commission's finding that he willfully violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and the Commission's Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5.

1. Following an administrative hearing at which petitioner was represented by counsel, an administrative law judge for the Commission found that petitioner had orchestrated options transactions having no bona fide purpose on the floor of the Chicago Board Options Exchange ("CBOE") and caused the public dissemination of those transactions in violation of the antifraud provisions of

the Securities Exchange Act of 1934. After independently reviewing the record and applying a "clear and convincing evidence" standard of proof,[1] the Commission reached the same conclusions and imposed a 30-day suspension (Pet. App. 1b-10b). The findings of the administrative law judge and the Commission were based, in part, upon sworn statements by Ronald R. Michno, a witness at the Commission's hearing, given in prior investigations conducted by the Commission and the CBOE.

On petition for review of the Commission's order, brought under Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), the court of appeals noted that the sole question before it was whether there was substantial evidence in the record to support the Commission's finding of a knowing violation. The court of appeals found that "the record contains substantial support for the result reached by the Commission" (Pet. App. 2a). Petitioner asks this Court to re-examine that determination.

2. Petitioner has never argued that any evidence was improperly admitted into the record at the Commission's hearing (Pet. 5 n.3). Indeed, at the hearing, petitioner consented to the introduction of the prior investigation statements given by Michno (Pet. 5; Pet. App. 5b n.8). Petitioner merely objects to the weight accorded to Michno's prior

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[1]Both the administrative law judge in his initial decision and the Commission in its review applied the "clear and convincing evidence" standard of proof as opposed to the "preponderance of the evidence" standard. The court of appeals noted that there was no issue before it as to whether clear and convincing proof of a violation was necessary (Pet. App. 2a). Subsequent to the court of appeals' decision, this Court held that this extraordinary burden of proof is not required in Commission disciplinary proceedings. *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981).

testimony (Pet. 7).[2] But such evidence, admitted with petitioner's consent, may properly be considered and accorded its natural probative effect. See *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155 (1941). Thus, review by this Court would only involve reappraisal of the adequacy of the evidence, a task already performed by the court of appeals. Under these circumstances, further review is not warranted. See *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503 (1951); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[3]

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[2]In Mincho's direct examination at the administrative hearing, counsel for the Commission's Division of Enforcement established that Mincho's current recollection of the contrived transactions was limited and that his prior testimony did not serve to refresh his recollection (App. 57-58). Mincho testified that he recalled that he did in fact give prior testimony to the CBOE and the Commission, that it was given truthfully and honestly, under oath, before a court reporter, with his counsel present, and that he had been advised of the CBOE's penalties for giving false statements and of the perjury statutes (App. 58-62, 71). ("App." refers to the joint appendix in the court of appeals.)

[3]In any event, the court of appeals correctly concluded that the Commission's findings were supported by substantial evidence. See Pet. App. 1b-9b. Contrary to petitioner's contention (Pet. 5), the evidence demonstrates that Mincho's previously recorded testimony was not self-contradictory, ambiguous or uncorroborated in any material respect (see App. 168-227). Rather, Michno's testimony, when examined in light of the other testimony and documentary evidence at the hearing, shows that petitioner carried out options transactions that had no bona fide economic purpose and thereby "knowingly caused the dissemination of materially misleading information to the public with respect to the state of the market for such options" (Pet. App. 2a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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The Commission suggests that in consenting to the admission of excerpts of Michno's investigatory transcripts into evidence rather than having them read into the record by the witness the Petitioner somehow waived or delimited his right to object to the competency of this hearsay evidence. (Mem. 3) Under the so-called residuum rule hearsay alone could not support an agency determination; a residuum of evidence of a type admissible in a jury trial also had to be present. See *Consolidated Edison* v. *NLRB,* 305 U. S. 197, 230 (1938); K. Davis, 2 *Administrative Law Treatise* § 14.10, at 292 (1958).

In *Richardson* v. *Perales,* 402 U. S. 390, 402 (1971), this Court rejected the rationale underlying the residuum rule and held that hearsay may be sufficiently trustworthy to support an agency finding if its "underlying reliability and probative value" can be assured.[1]

Since this Court's decision in *Richardson,* a respondent in an agency proceeding no longer has any basis for objecting to the admissibility of hearsay evidence on the ground that it could not constitute substantial evidence. Concomitantly, the failure to make such an objection does not relieve the agency of its burden of establishing the underlying reliability and probative value of such evidence or the Court of Appeals of its responsibility to "evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility." *Johnson* v. *United States,* 628 F. 2d 187, 190-191 (D. C. Cir. 1980)[2]

The Commission also suggests that Michno's investigatory testimony concerning the circumstances surrounding the initiation and execution of the transactions was not self-contradictory, ambiguous or uncorroborated in any "material"

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[1] In *Richardson,* the Court delineated numerous factors which assured the underlying reliability and probative value of the reports of the licensed physicians and rejected the argument that the petitioner's inability to cross-examine each physician at the hearing diminished the reliability of this evidence on the ground that the "claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician." *Id.* at 402. Unlike the situation in *Richardson,* in the present case the Petitioner was unable to cross-examine the witness concerning the ambiguities and inconsistencies in his investigatory testimony because of a lapse in memory.

[2] In the present case, it is impossible to ascertain from the per curiam opinion of the Court of Appeals the basis upon which it determined that the testimony in the investigatory transcripts was sufficiently reliable and probative that it constitutes substantial evidence. (Pet. App. 1a) In the absence of such a finding by the Court of Appeals, this Court can only speculate as to the rationale of its determination.

respect. (Mem. 3, n.3). There is no other evidence in the record concerning the content of communications between Michno and the Petitioner at the time the transactions were initiated. The self-contradictions in the testimony relate to such matters as the details surrounding the initiation and execution of the transactions, and Michno's prior business relationship with the Petitioner.

When viewed in the context of the undisputed evidence in the record that Michno had engaged in approximately 100 prearranged trades with the other party to these transactions during the month before they were initiated, these ambiguities and contradictions in his investigatory testimony are very material to the issue concerning the legitimacy of the Commission's inference that the Petitioner "orchestrated" these transactions (Pet. App. 5b). The lack of corroborating evidence and the Petitioner's inability to confront and cross-examine Michno concerning these contradictions raises a serious question as to whether the underlying reliability and probative value of this hearsay evidence was sufficiently assured that it could constitute substantial evidence which would support a finding of fraud.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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